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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]
240

JOSEPH COVELLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph Covello, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction as to petitioner entered by the United States District Court for the Southern District of New York, Mansfield, J., upon eight counts of a nineteen count indictment for conspiracy to violate and substantive violations of federal wagering statutes, 18 U.S.C. §§ 1084, 1952.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, is printed in the Appendix to this Petition. (App. 1a-26a.)

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1969. (App. 27a.) Petition for Rehearing was filed April 7, 1969; the Court of Appeals invited an answer from the Government on April 21, 1969 (App. 28a); the Government's answer was filed May 5, 1969; the Petition for Rehearing was denied by the Court of Appeals May 15, 1969 (App. 29a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in construing the Jencks Act, 18 U.S.C. § 3500:

a. In subsection (a), which prescribes the scope of the Act, the term "trial of the case" includes an evidentiary hearing on a pretrial motion.

b. Subsections (b) and (c), which limit producible statements and excerpts to those that "relate to the subject matter" of a Government witness' direct testimony, authorize production of all portions of the witness' statement which are material to the preparation of proper cross-examination.

c. Subsection (d), which imposes sanctions for an election by the Government not to comply with a disclosure order under the Act, should be applied where the agents of the FBI follow a regular practice of destroying original handwritten notes after a typewritten interview report has been prepared.

d. In subsection (e), which defines the kinds of "statement" covered by the Act, the term "statement" includes a witness' federal income tax return or other governmental document signed by the witness but submitted to the government for reasons unconnected with the criminal investigation.

2. Whether, in light of *Dennis* v. *United States,* 384 U.S. 855 (1966), the rule of *Costello* v. *United States,* 350 U.S. 359 (1956), apparently allowing all federal indictments to be returned solely on hearsay evidence, should be reconsidered and limited.

3. Whether a defendant has the standing requisite to obtain an evidentiary hearing upon a motion to suppress fruits of electronic eavesdropping:

a. Where eavesdropping at the premises of a third party is first revealed while the defendant's appeal from conviction is pending and the defendant alleges that he was frequently present on the "bugged" premises during the period of the conceded electronic surveillance thereof.

b. Where the person overheard was the speaker at the other end of a telephone communication to the defendant's alleged premises.

STATUTE INVOLVED

The Jencks Act, 18 U.S.C. § 3500, provides:

> "§ 3500. Demands for production of statements and reports of witnesses
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of

the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be

reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

STATEMENT

Petitioner, Joseph Covello, was tried with three co-defendants upon a 19 count superseding indictment charging conspiracy to violate and 18 substantive violations of federal statutes proscribing interstate wagering activities, 18 U.S.C. §§ 1084, 1952. (13a-18a.)[1] Basically the indictment charged that the defendants used interstate telephone facilities between New York and New Jersey, and interstate travel between New

[1] Record references are to the printed Appendix in the Court of Appeals, unless otherwise indicated.

Jersey and New York, in carrying on a bookmaking enterprise in violation of New Jersey law. Petitioner was convicted upon the conspiracy count and seven substantive counts, and acquitted by the jury on the remaining eleven substantive counts. (471a-72a.) He was sentenced to three years' imprisonment, and his conviction was affirmed by the United States Court of Appeals for the Second Circuit. One of the co-defendants was acquitted by the trial court at the close of the Government's case (411a); the other two co-defendants were found guilty by the jury on the conspiracy count and various substantive counts in which they were named (471a-72a), were sentenced to six months' imprisonment and did not appeal.

The testimony upon which petitioner Covello was convicted came from four Government witnesses from New York, who testified to their interstate wagering transactions with Covello, who was a resident of New Jersey. The principal Government witness was Merrill Garfinkel; the others were his brother Howard Garfinkel, Herbert Seid and Vincent Conour.

Petitioner, who was employed as the manager of a Newark night club during the period in issue (391a, 409a), acknowledged in both opening statement (134a) and summation (418a-24a), that he had participated in wagering transactions with the Government witnesses. The key factual issue for the jury to determine was which party to the wagers was the bookmaker—petitioner or the Government witnesses. That petitioner was in the bookmaking business was an essential element that had to be proved under the indictment and the instructions (435a-36a). The defense contention in this regard was, as summarized by the court to the jury:

> "The defendants further contend that the Government has failed to establish beyond a reasonable doubt that Covello was a professional bookmaker but, on the contrary, they say the evidence shows that the bookmakers were Merrill Garfinkel, Seid and Conour, and that most of the evidence indicates that Covello and Molinaro were merely placing bets with Garfinkel, Seid and Conour as bookmakers." (440a-441a.)

The Government in summation told the jury to acquit petitioner in five minutes if they did not find that he was a bookmaker. (Trial Transcript, p. 960.)

Following the direct testimony of the principal witness, Merrill Garfinkel, the trial court ruled that numerous excerpts from FBI interview reports of Merrill Garfinkel, and some entire reports, should be withheld from the defense. Having conducted an *in camera* examination of such excerpts and reports pursuant to 18 U.S.C. § 3500(c), the court recited that it did not find "any material in there other than what has already been turned over that relates to the direct of the witness." (202a-03a.) A similar ruling was made with respect to portions of two FBI interview reports of the witness Howard Garfinkel. (255a.) The withheld materials were sealed for purposes of appellate review of their producibility. (10a, 199a, 203a-04a, 255a, 469a.) On appeal petitioner, without the benefit of knowing the content of the sealed materials, requested that the Court of Appeals review the question of their producibility. The Court of Appeals, having conducted such review, concluded:

> "We have examined the sealed statements and we hold that the trial court did not commit error. In essence the withheld materials related to the Garfinkels' knowledge of the gambling activities

of persons other than the defendants. While the information contained in these materials may have been employed by defense counsel to show that the Garfinkels, whose 'betting line' activities they had themselves testified to, were engaged in the business of bookmaking, it is clear that the information the trial judge withheld was not sufficiently relative to the subject matters the witnesses had testified about to fall within the limits of demandable material Congress had carefully delineated in 18 U.S.C. § 3500; and if the defense demand had been complied with the judge would have exceeded the statutory proscription embodied within 18 U.S.C. § 3500 (b).'" (App. 17a.)

The Court of Appeals also affirmed the trial court's rulings (202a, 256a, 314a) denying production under the Jencks Act of the federal income tax returns of the Government witnesses for the years of their wagering transactions with petitioner.[2] The Court of Appeals held:

"Appellant also contends that he was entitled to the federal income tax returns of the Government's main witnesses as 'statements' of the witnesses within the meaning of 18 U.S.C. § 3500(e)(1). While there is no decision on point, the argument is unpersuasive. The filing of the returns of the witnesses was unconnected with the investigation of Covello's activities or the criminal proceedings initiated against him, and the returns were filed with an entirely separate federal agency. Although it is the privilege of defense counsel in

[2] The returns were sealed for purposes of appellate review of their producibility (204a, 257a, 469a), but the trial court's ruling was made without any inspection of the returns to determine their relevance to the witnesses' direct examination, and so far as appears from the opinion the Court of Appeals likewise did not inspect their contents.

> run-of-the-mill situations to decide whether examination of requested material would advantage the defense, here it seems clear that these income tax returns could not have been in any way helpful. Each witness admitted that he had not reported any income he received from gambling activities, and, as the witnesses had testified they had gambled, these confessions were the most Covello could have hoped to extract from them, for the only purpose the returns could have been used for was that of impeaching the credibility of the makers, see *Rosenberg* v. *United States,* 360 U.S. 367 (1959). Therefore, we do not rule upon the issue appellant would have us rule upon but state that under the circumstances here it would not appear to have been error to have withheld the returns; but, if error, the error did not prejudice the defense in any way." (App. 16a.)

The defense received under § 3500 at trial a number of typewritten FBI interview reports (or excerpts therefrom) of Government witnesses. Specific requests under § 3500 for production of the FBI agents' handwritten notes of these interviews were unavailing, because in each instance the interview notes had been destroyed. (200a, 220a, 223a, 315a, 358a-61a.) According to the testimony on *voir dire* of the two agents who had destroyed the notes, the agent had not received any directive from the FBI on the subject of conserving or destroying interview notes (229a, 365a), but each made it his regular practice to destroy interview notes after preparing a typewritten report. (223a, 230a-31a, 358a-61a, 365a.) Each agent testified that his destruction of the notes was not for the purpose of preventing defense counsel from obtaining them at trial. (223a, 359a.) But it was acknowledged by the agent who prepared most of the interview re-

ports that a trial was contemplated at the time the notes were destroyed.

> "Q. At the time you were conducting these interviews did you anticipate that the case would eventually be presented to a grand jury? A. Yes, I did.
>
> "Q. And did you anticipate it would eventually be tried in this court? A. Yes, sir.
>
> "Q. And at the time you destroyed your notes, did you anticipate that the case would eventually be presented to a grand jury? A. Yes, sir.
>
> "Q. And did you at that time anticipate that the case would eventually be tried in this court? A. Yes, sir." (364a.)

The Court of Appeals, affirming the trial court's ruling that the destruction of interview notes did not warrant the striking of the interviewee-witness' direct testimony pursuant to § 3500(d), rejected petitioner's claim "that the good faith destruction of handwritten interview notes deprived him of his rights at trial under the Jencks Act." (App. 14a-16a.)

Electronic Eavesdropping

The trial court held an evidentiary hearing upon petitioner's pretrial motion to suppress the fruits of electronic eavesdropping upon interstate telephone calls made by one Pasquale Borgese from New York telephone booths[3] to the New Jersey number ORange 6-

[3] The validity of the eavesdropping upon Borgese, conducted by means of microphones concealed in telephone booths, was pending before the Second Circuit upon Borgese's appeal at the time petitioner's pretrial motion to suppress was filed. (See Judge Frankel's opinion herein, 68a-71a.) During petitioner's trial the Government informed the Court of Appeals that Borgese's conviction was tainted by previously unrevealed wiretapping, and in consequence Borgese's conviction was reversed without deciding the validity of the eavesdropping upon Borgese's calls from the telephone booths. *United States* v. *Borgese*, 372 F. 2d 950 (2d Cir. 1967).

1730. The fact of the eavesdropping was not disputed, but the Government's sole witness at the hearing, FBI agent Neumann, testified that the information for the instant prosecution was derived solely from an independent source (75a-77a). Petitioner's motion for production under 18 U.S.C. § 3500 of the agent's reports, insofar as they related to the agent's direct testimony on the motion to suppress, was denied on the ground that § 3500 has no application to a hearing on a motion to suppress (77a-80a). The Court of Appeals upheld this ruling. In interpreting the prohibition of 18 U.S.C. § 3500(a) against production "until said witness has testified on direct examination in the trial of the case", the Court of Appeals followed cases which "construed the statute literally, reading 'trial' to mean 'trial' ". (App. 11a-14a.)

The trial court, following conclusion of the evidence at trial, ruled that it had not been derived from an eavesdrop upon Borgese's telephone calls to ORange 6-1730; the legality of the eavesdrop was therefore not decided. (412a-13a.) On appeal, where petitioner challenged procedural rulings that had led to this conclusion, the Court of Appeals did not pass on such challenges nor on the legality of the eavesdrop; the opinion apparently held that petitioner lacked standing because he had not shown that his conversations were overheard in the eavesdropping upon Borgese's end of the telephone calls to ORange 6-1730.[4] (See App. 19a-20a and n. 18.)

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[4] The jury had convicted petitioner on the five substantive indictment counts based upon calls by Merrill Garfinkel to ORange 6-1730, but had acquitted him on the eleven substantive counts based upon Merrill Garfinkel's calls to other New Jersey telephone numbers. (38a-39a, 471a-72a.)

While petitioner's appeal was pending, the United States Attorney for the District of New Jersey filed a pleading in another case, *United States* v. *DeCavalcante,* Crim. No. 111-68 (D. N.J.), admitting electronic eavesdropping during lengthy periods of time at four locations, three in New Jersey and one in Pennsylvania. In correspondence treated by the Court of Appeals as supplemental briefs (App. 21a), petitioner asserted that he had been present at two of these New Jersey locations on numerous occasions during the period of the eavesdrops. (App. 23a, 24a.) On the basis of information furnished by the FBI that "Covello could not be identified as being present at or a participant in any conversations monitored by electronic devices at these locations" (App. 23a, n. 15), the Court of Appeals rejected petitioner's contention that the case should be remanded for an evidentiary hearing at which he could cross-examine the surveilling agents and seek to establish that unidenfified voices overheard by the eavesdropping included his. (App. 21a-26a.)

Grand Jury Procedures

The Court of Appeals also affirmed the trial court's denial of a motion in arrest of judgment. (App. 18a.) The motion was premised on the revelation during trial that the indictment had deliberately been obtained upon hearsay testimony, instead of calling any of the witnesses to the alleged transactions with petitioner before the grand jury. The Court of Appeals, while disapproving the practice followed, accorded no remedy. The court held:

> "The Government's four main witnesses, Merrill and Howard Garfinkel, Seid, and Conour, did not testify before the grand jury that returned the

original indictment or the grand jury that returned the superseding indictment. *Though these witnesses were available to be called the only evidence presented to either grand jury was hearsay testimony by FBI agents who related statements made to officers by Merrill Garfinkel and Conour.* This was discovered by the defense at trial and appellant, attacking the validity of the indictment, moved in arrest of judgment. This motion was denied. We affirm. In *Costello* v. *United States,* 350 U.S. 359 (1956) the Supreme Court held that an indictment based exclusively on hearsay need not be dismissed. See also *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400 (1958). *Though we have recently voiced our disapproval of indictments grounded totally on hearsay where the witnesses whose information was related to the grand jury by others were available to testify in person, we have never quashed an indictment for this reason. United States* v. *Umans,* 368 F. 2d 725, 730 (2 Cir. 1966), *cert. dismissed as improvidently granted,* 389 U.S. 80 (1967); . . ." (App. 18a; emphasis supplied.)

REASONS FOR GRANTING THE WRIT

1. The Jencks Act, 18 U.S.C. § 3500, has now been in effect for a dozen years and is daily invoked and applied in the district courts. Yet in administering the Act the district courts have been without guidance from this Court on several basic questions of statutory interpretation. The instant case presents important questions of construction involving each of the subsections (a) through (e) of the Act. These questions were raised in the District Court, and considered at some length in the Court of Appeals' opinion; the instant record thus affords an opportunity for this Court in a single case to resolve a number of important questions in interpretation of the Act. Since the resolu-

tion of each question requires consideration of the purpose and design of the statute as a whole, petitioner respectfully submits that it may be helpful to the Court to consider these questions in a case where they are presented together on one record, rather than to face them piecemeal over the years.

The four questions of Jencks Act construction which this case illustrates and presents may best be set forth here in the chronological order in which they arise in the administration of a federal criminal prosecution.

(i) At the stage when the prospective government trial witness is interviewed by government agents [See § 3500(d)]

As illustrated by this case, it appears to be a regular practice of interviewing agents of the FBI to make contemporaneous handwritten notes during their interview of a witness, then to prepare a typewritten interview report, following which the handwritten interview notes are destroyed. The recurrent nature of this problem was indicated by Judge Sobeloff in *United States* v. *Johnson,* 337 F. 2d 180 (4th Cir. 1964), *affirmed* 383 U.S. 169 (1966), *cert. denied Edlin* v. *United States,* 385 U.S. 846 (1966):

> "This is not the first time that a court has been called upon to consider the effect of the destruction of FBI interview notes. *Campbell* v. *United States,* 373 U.S. 487, 83 S. Ct. 1356, 10 L. Ed. 2d 501 (1963); *Killian* v. *United States,* 368 U.S. 231 (1961); *Ogden* v. *United States,* 323 F. 2d 818, 820-821 (9th Cir. 1963); *United States* v. *Greco,* 298 F. 2d 247 (2d Cir. 1961). *Each time the problem has arisen the FBI has claimed that the notes were destroyed as part of FBI routine. This is really not a satisfactory answer.* . . . One of the purposes of both the Jencks decision and the Jencks Act is to afford the defense an opportunity

to impeach witnesses. *Palermo* v. *United States,* 360 U.S. 343, 79 S. Ct. 1217, 3 L. Ed. 2d 1287 (1959); *United States* v. *Wenzel,* 311 F. 2d 164, 171 (4th Cir. 1962). The destruction of interview notes does not advance this purpose. Of course, a district court may find as a fact that the notes were not a substantially verbatim record, or that they were accurately copied into a report and then destroyed in good faith, but the necessity for inquiries along this line can be avoided by the preservation of notes until after the trial. Eliminating uncertainty may serve the interest of the Government no less than the defendant." 337 F. 2d at 201-02 (emphasis supplied).

The continuance of such destruction of notes "as part of FBI routine" is difficult to accept in light of the Solicitor General's representation to this Court—when he urged the Court to deny certiorari on the issue of destruction of interview notes—that:

> "Procedures have since [*i.e.* since the interview involved in *Campbell*] been established under which the FBI makes every effort to prepare statements of reports in a form that would render them producible under 18 U.S.C. § 3500. And while it is not deemed administratively feasible to retain all the personal notes taken by the Agent, *those notes which in themselves constitute a producible statement or a transcription thereof are retained for purposes of production under the statute.*" Brief for the United States in Opposition to Petition for Writ of Certiorari, *Campbell* v. *United States,* 373 U.S. 487 (No. 631, Oct. T. 1962), p. 16. (Emphasis supplied.)

In the instant case, unlike *Johnson,* FBI interviews postdate the Solicitor General's representation in *Campbell.* Yet the record here reveals that no method appears to have been employed to communicate that

representation to FBI agents and translate it into FBI policy. The experienced agents who destroyed their notes in the instant case testified that they had not received any directive from the FBI as to preservation of interview notes. (229a, 365a.) Agent Neumann had "always followed this course, policy" of destroying interview notes after preparing his typewritten report. (365a.) He testified that "according to our handbook" notes are to be retained only in accounting cases and uncompleted investigations of applicants, but not in criminal investigations. (365a.) It is also apparent that the "handbook" did not require complete typewritten transcription of the handwritten interview notes, since the typewritten interview reports did not include "word for word the materials in [the] handwritten notes" (366a). The typewritten reports included all the items which the agent considered "pertinent", but not usually in the witness' "exact words" (366a).

Trial lawyers, and presumably FBI agents, are aware how much more useful for impeachment purposes may be a statement in which the interviewer has written down the witness' original, unedited observations, than a subsequently prepared "polished" narrative report of the witness' story. "One of the purposes of both the Jencks decision and the Jencks Act is to afford the defense an opportunity to impeach witnesses. *Palermo* v. *United States*, 360 U.S. 343 (1959) . . . . The destruction of interview notes does not advance this purpose." *United States* v. *Johnson*, *supra*, at 202. But this purpose will continue to be retarded unless and until this Court clearly specifies that the regular practice of destroying interview notes will be treated as an election not to comply with the production re-

quirements of the Jencks Act, and therefore be subject to the sanction (striking of the witness' direct testimony) imposed by 18 U.S.C. § 3500(d).

In *Campbell* v. *United States,* 365 U.S. 85, 98 (1961), this Court left open the question whether good faith destruction of handwritten notes deprives the defendant of rights under the Jencks Act. The question was again left open in *Campbell* v. *United States,* 373 U.S. 487, 491, n. 5 (1963) (*Campbell II*). The question should be answered now.

(ii) At the pretrial motion stage [See § 3500(a)]

This Court has never passed upon the question of whether the term "trial of the case" in 18 U.S.C. § 3500(a) includes pretrial hearings. As the opinion below indicates, there is a dearth of appellate authority on this point, outside of the Second Circuit (see App. 14a). Yet the question of the Act's application to a pretrial hearing on a motion to suppress, or to a post-trial hearing on electronic eavesdropping (see *Alderman* v. *United States,* 37 U.S.L.W. 4189 (March 10, 1969)), or to other pretrial or post-trial evidentiary hearings, is of crucial importance in determining the scope of the Act's coverage.

An affirmative answer is also of crucial importance to the opportunity of the defense to controvert the Government's version of the facts at a hearing on a motion to suppress. Frequently such a motion turns upon facts within the exclusive knowledge of a Government agent, *e.g.,* what information he had to give him probable cause for an arrest, or as in the instant case, whether he had an untainted source for leads to evidence. Unless an agent's reports on such matters are producible under § 3500, the defendant and the

Court are left with no adequate basis for testing and evaluating the accuracy of the agent's testimony on the motion.

Under *Palermo* v. *United States*, 360 U.S. 343 (1959), as under the opinion below (App. 12a), unless the agent's report is held producible under § 3500, it is not producible at all. This Court should therefore determine whether the restriction imposed by § 3500 (a) against production "until said witness has testified on direct examination in the trial of the case" should be construed to bar production at pretrial evidentiary hearings.[5] The question takes on added importance in view of the increased scope for pretrial suppression motions provided by the Crime Control and Safe Streets Act of 1968, Pub. L. 90-351. See 18 U.S.C.A. § 2518 (Supp. 1969), which provides for governmental eavesdropping and wiretapping and, in 18 U.S.C.A. § 2518(10)(a), for motions to suppress its fruits; *cf.* 18 U.S.C.A. § 3501(a) (Supp. 1969), which provides for a determination of the voluntariness of a confession outside of the presence of the jury but does not specify whether this may be done by pretrial motion to suppress.

(iii) At the stage of production at trial [See § 3500(e)(1)]

18 U.S.C. § 3500(e) defines the term "statement" as used in the Act. Subsection (e)(1) includes within the definition of "statement": "a written statement made by said witness and signed or otherwise adopted or approved by him". A "statement" within the Act's definition must, on defendant's motion at the close of the witness' direct examination, be produced

[5] The question also arises as to post-trial evidentiary hearings where the witness in question was not a witness at trial.

either directly to the defendant or to the Court for *in camera* examination of relevancy. 18 U.S.C. § 3500 (b), (c)...

The issue presented here is whether a witness' tax return, or other signed document submitted by the witness to a federal agency for purposes unrelated to the criminal prosecution, should be producible to the defense, provided that the return or document contains material relating to the witness' direct testimony. If it contains no such relevant material, the *in camera* inspection by the Court pursuant to § 3500(c) will result in its denial to the defense. But unless the return or other document is held to be a "statement" within the meaning of § 3500(e)(1), it will never be submitted for the Court's *in camera* determination under § 3500 (c).

The language of § 3500(e)(1), literally read, does not require that the witness' signed statement have been made in connection with the investigation or prosecution of the case on trial, or indeed with any criminal prosecution. Petitioner contends that no such limitation should be read into § 3500(e)(1); the Act should require production of any written statement which the witness has given to the Government and which contains material relating to the subject matter of the witness' direct testimony. A typical example of such a "statement", involved in this case, would be the witness' federal income tax return for the year in which he allegedly had the financial transactions about which he has just testified on his direct examination.

The question of whether the Jencks Act definition of "statement" includes a witness' federal income tax return (or other signed documents which he has sub-

mitted to the Government for purposes unconnected with the pending prosecution), appears not to have been considered in any reported decision. However, cases are common in which a defendant is charged with some type of unlawful financial transaction with a Government witness. Likewise, cases in which a Government witness has filed some Government form that covers subject matter about which he is later examined in a criminal prosecution will often arise. In such cases the Government, of course, has access to the witness' statement even though it was obtained independently of the criminal investigation or prosecution. *E.g.*, Treasury Regulations expressly authorize the United States Attorney to inspect and obtain tax returns for use in litigation or preparation for litigation. Treas. Regs. 301.6103(a)-1(g), (h). Under the philosophy expressed by this Court in *Dennis* v. *United States*, 384 U.S. 855, 873 (1966): "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." (Footnote omitted.) *Dennis* cites the Jencks Act as reflecting "the growing realization that disclosure rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice." *Id.* at 870.

Production of a witness' federal income tax return, where it contains information relevant to the witness' direct examination, would serve the purpose of the Act. "The purpose of the proposed legislation is to establish a procedural device that will provide such a defendant with the authenticated statements and reports of Government witnesses which relate directly upon his testimony." S. Rep. No. 569, 85th Cong., 1st Sess., p. 2, quoted with approval in *Clancy* v. *United*

States, 365 U.S. 312, 315 (1961). Federal income tax returns, signed under penalty of perjury, are the very type of "authenticated statements" which should have the greatest indicia of reliability and thus constitute the fairest source of impeachment material.[6] Such a return should afford an even more reliable source for fairly impeaching the witness than an interviewing agent's report of an oral statement of the witness, producible under 18 U.S.C. § 3500(e)(2).

(iv) At the stage of in camera inspection [See § 3500(b), (c)]

Section 3500(b) limits the production of statements under the Act to those "which relat[e] to the subject matter as to which the witness has testified." In order to implement this limitation, § 3500(c) provides for

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[6] In the instant case the Court of Appeals held that: "Here it seems clear that these income tax returns could not have been in any way helpful." (App. 16a.) But if the return was a "statement" within the meaning of the Act, this is not a conclusion that can fairly be reached without the defendant having had an opportunity to see the statement and suggest the manner in which it could be used to impeach the witness' testimony. The opinion below apparently assumes that the only possible use of the returns in impeaching credibility was to show that the witness had *omitted* information and income from his return, and states that this much the witness had "admitted" (App. 16a). But the returns of one or more of the four Government witnesses might well have included information or income that would have contradicted the witness' direct testimony. *E.g.*, the witness' return might have shown an income far too small for him to have placed repeated bets with petitioner in the large amounts claimed in the witness' direct testimony. Or conversely, the return might have shown that, despite the witness' "admission" that he had not reported gambling income, he had in fact reported substantial amounts of non-wage income attributed to some unidentified source, such as "miscellaneous income" or "commissions". Such an entry could have been employed on cross-examination to develop that the witness made his living as a gambler and was engaged in the business of bookmaking, as the defense contended (see 420a-23a; pp. 6-7, *supra*).

the inspection by the Court *in camera* of any statement which the Government claims "contains matter which does not relate to the subject matter of the testimony of the witness". If the Court upholds the Government's contention, the matter in issue is withheld from the defense. The same procedure is followed, as it was herein, where the Government contends that an entire statement "does not relate to the subject matter of the testimony of the witness". In the instant case, pursuant to the *in camera* inspection, some statements were withheld in their entirety and others in part.

This Court has never defined the test of relevancy to be applied in determining whether a statement or portion thereof "relates to the subject matter" of the witness' direct testimony. In *Rosenberg* v. *United States,* 360 U.S. 367, 370 (1959), this Court held that: "A statement by a witness that she fears her memory as to the events at issue was poor certainly 'relates to the subject matter as to which the witness has testified' and should have been given to defendant." This indicates that the statutory language extends to impeaching information not mentioned by the witness during direct examination. But it does not spell out a standard of relevancy.

The Circuit which has most clearly enunciated a test of relevancy under § 3500(b) and (c) is the Ninth:

> "[T]he test to be applied is not whether the material would be 'relevant' in the evidentiary sense, but only whether it relates generally to the events and activities testified to. The problem is not whether a question framed precisely in the terms of the withheld information would relate to the subject matter of the direct examination, but rather *whether the withheld material might be useful in framing questions which would be rele-*

> *vant to that subject matter.* The appropriate analogy is found in Rule 16 of the Federal Rules of Criminal Procedure, and *the proper inquiry is whether the omitted portions of the statement 'may be material to the preparation' of proper cross-examination.* Doubts are to be resolved in favor of disclosure, for the Court necessarily proceeds without the benefit of counsel's more intimate knowledge of the possible significance of particular information for purposes of impeachment." *Ogden* v. *United States,* 303 F. 2d 724, 740 (9th Cir. 1962), *cert. denied,* 376 U.S. 973 (1964). (Emphasis supplied; footnotes omitted.)

In the instant case, it appears that the withheld statements and portions of statements of the Garfinkels would have been producible under the Ninth Circuit test, since they were " 'material to the preparation' of proper cross-examination." They would have been "useful in framing questions which would be relevant to that subject matter" about which the Garfinkels had testified. Petitioner necessarily makes this contention without benefit of any opportunity to have seen the withheld materials. However, the court below acknowledged in its opinion that "the information contained in those materials may have been employed by defense counsel to show that the Garfinkels, whose 'betting line' activities they had themselves testified to, were engaged in the business of bookmaking. . . ." (App. 17a.) Such cross-examination would have borne upon the critical issue of whether it was defendant or Merrill Garfinkel who was the bookmaker in their wagering transactions. (See pp. 6-7, *supra.*) By employing the materials "to show that the Garfinkels . . . were engaged in the business of bookmaking," the defense would have impeached Merrill Garfinkel's direct testimony that he "placed" bets when

he telephoned Covello in New Jersey (145a-46a, 161a-62a). For if the Garfinkels were engaged in the business of bookmaking, this would strongly tend to establish that Merrill Garfinkel had *accepted* the wagers with Covello, not *placed* them. It is the professional bookmaker who "accepts" a wager (see 435a) and his customer who "places" one. *Cf.* 26 U.S.C. § 4401.

The test applied by the Second Circuit was plainly narrower than that of the Ninth, since the court below concluded that the withheld information "was not sufficiently relative to the subject matters the witnesses had testified about to fall within limits of demandable material Congress had carefully delineated in 18 U.S.C. § 3500; and *if the defense demand had been complied with the judge would have exceeded the statutory proscription embodied within 18 U.S.C. § 3500 (b).*" (App. 17a; emphasis supplied.)

Petitioner contends that the Ninth Circuit test in *Ogden* should be adopted by this Court, and that the analogy to Rule 16 standards in the Ninth Circuit test is a useful one. But in any event, petitioner submits, experience under the Act shows that it would be desirable for all the district courts applying the relevancy test under § 3500(b) and (c) to have a guiding standard promulgated by this Court.

2. In *Costello* v. *United States*, 350 U.S. 359 (1956), the Court held that the Fifth Amendment permits any indictment to be returned solely on hearsay evidence, and declined to exercise its supervisory power to establish a rule allowing indictments to be challenged on this basis. *Id.* at 363-64. Petitioner submits that reconsideration of such a supervisory rule is now appropriate, in order to prevent circumvention of the

right established by *Dennis* v. *United States,* 384 U.S. 855 (1966), to obtain the grand jury testimony of Government witnesses for impeachment at trial.

The defendant's right to production of grand jury testimony under *Dennis* is rendered almost meaningless if the Government can avoid production by the expedient of not calling the witness before the grand jury, but instead having an agent read to the grand jury from an interview report. That practice was followed in the instant case although, as the court below found, the trial witnesses were available to be called during the grand jury proceedings (App. 18a). The opinion below likewise indicates that the same practice had come to the Second Circuit's attention in a number of recent cases. (App. 18a.) It seems a reasonable surmise that the origin of this practice lay in the circumstance that, prior to *Dennis,* the Second Circuit had the most liberal rule for production of grand jury testimony for purposes of impeachment at trial. See *Dennis* v. *United States, supra,* at 874 and n. 21. The relation between the *Dennis* and *Costello* rules was noted by Judge Weinstein of the United States District Court for the Eastern District of New York in a recent case where the indictment was based on hearsay. *United States* v. *Arcuri,* 282 F. Supp. 347 (E.D.N.Y. 1968), *affirmed,* 405 F. 2d 691 (2d Cir. 1968), *cert. denied,* Misc. No. 1686, 37 U.S.L.W. 3343 (May 19, 1969).

> "In a burst of exuberance at the release from pre-*Costello* restrictions, federal prosecutors appear to have made substantial use of the technique typified by the instant case." *Id.,* 282 F. Supp. at 348.

The practice of using hearsay instead of eyewitness grand jury testimony has an even more fundamental

vice than depriving the defendant of *Dennis* rights. For it deprives him of any meaningful observance of his Fifth Amendment right to have independent consideration of the case against him by a grand jury. Where the prosecutor has selected an agent without personal knowledge to read statements of witnesses to the grand jury, the latter is reduced to rubber-stamping the prosecutor's judgment that an indictment should be returned. As Judge Weinstein observed:

> "There is no reason to believe that the Supreme Court in *Costello* intended to encourage the practice before grand juries of deliberately relying solely on the testimony of witnesses without any personal knowledge when better evidence is readily at hand. . . .
>
> The practice—as in the instant case—of relying on hearsay rather than upon the testimony of eyewitnesses . . . habituates the grand jury to rely upon 'evidence' which appears smooth, well integrated and consistent in all respects. . . . Thus, they are unable to distinguish between prosecutions which are strong and those which are relatively weak. All cases are presented in an equally homogenized form. A grand jury so conditioned is unable to adequately serve its function as a screening agency. It cannot exercise its judgment in refusing to indict in weak cases where, technically, a prima facie case may have been made out." *United States* v. *Arcuri, supra,* 282 F. Supp. at 349.

In a similar vein, the Second Circuit has noted:

> ". . . excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are sup-

posed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge." *United States* v. *Umans*, 368 F. 2d 725, 730 (2d Cir. 1966), *cert. granted*, 386 U.S. 940, *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967).

But the Second Circuit in *Arcuri* stopped short of approving Judge Weinstein's statement of a rule that future indictments in his district would be dismissed, and without a showing of prejudice to the defendant, "if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury", 282 F. Supp. at 351.[7] See 405 F. 2d at 694. Since the question is one which involves the use of judicial supervisory powers to protect basic Fifth Amendment rights, a uniform rule for all districts, laid down by this Court, should be considered.

3. This case presents issues concerning standing to suppress the fruits of electronic eavesdropping, which were left unresolved in *Alderman* v. *United States*, 37 U.S.L.W. 4189 (March 10, 1969).

The court below held that: "The rules set forth in *Alderman* do not become operative unless there is an

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[7] In *Costello*, by contrast, it cannot be said that "better evidence was readily available for presentation to the grand jury". *Costello* was an income tax case proved by the "net worth method," and the crucial testimony in such a case is that of the agents who summarize and compute. As Justice Burton's concurring opinion in *Costello* noted, the agents' testimony, although based on transactions of which they lacked personal knowledge, was important and admissible evidence at trial once a foundation had been laid. See 350 U.S. at 364-65 (concurring opinion).

admission by the Government that a pertinent electronic eavesdropping had occurred." (App. 26a.) Petitioner had asserted in the Court of Appeals that he was present on numerous occasions at two locations which, during the pendency of his appeal, were conceded in pleadings filed in another case to have been the subject of prolonged electronic surveillance. Since the Government did not admit that petitioner had been overhead on these eavesdrops but asserted in the Court of Appeals that "Covello could not be identified as being present at or a participant in any conversations monitored by electronic devices at these locations" (App. 23a, n. 15), the court denied petitioner's request to remand for a hearing with respect to these two eavesdrops:

> "[O]therwise we would enable any defendant each time an eavesdropping of a location is disclosed subsequent to his trial to assert he was present at that location sometime during the 'bugging' and thereby be entitled to a suppression hearing." (App. 25a.)

Petitioner submits that a defendant who asserts his presence upon premises which were "bugged" should be entitled to an evidentiary hearing at which, if his assertions are established by the proof, he will be accorded standing to suppress the fruits of eavesdropping upon conversations held in his presence, and an opportunity to show that such conversations were overheard. The alternative, of denying an opportunity to prove standing to suppress because the Government has not admitted it, petitioner submits is a misapplication of *Alderman*. Indeed, Alderman was accorded an evidentiary hearing even though the Government asserted in this Court that Alderman—unlike his co-

petitioner Alderisio—"neither participated in any conversations overheard nor had any interest in the places which were the object of the surveillance." 37 U.S. L.W. at 4190, n. 1.

The instant case also presents another question of standing: whether a person whose telephone number is called has standing to suppress the fruits of an eavesdrop that overhears only the caller's end of the conversation. This is a frequent occurrence in cases of eavesdropping, but the criteria of standing laid down in *Alderman* do not clearly resolve the question. The rule announced in *Alderman,* that a defendant has standing to suppress "if the United States unlawfully overhead conversations of a petitioner himself or *conversations occurring on his premises,* whether or not he was present or participated in those conversations", 37 U.S. L.W. at 4192 (emphasis supplied), is not directly addressed to a situation where the eavesdrop occurs at the other end of the telephone line, not located on the defendant's premises. Petitioner submits that this Court should consider whether the rationale of standing in *Alderman* extends to a telephone communication which is transmitted to, and received by telephone at, petitioner's premises,[8] even though the eavesdropping device picks up the caller's words from the other end of the line.

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[8] The Government's allegations and proof in this case were that petitioner used the premises at 312 Park Avenue, East Orange, New Jersey, where telephone number OR 6-1730 was located, as an office for the conduct of his wagering business. The jury convicted petitioner on the counts based on interstate calls to OR 6-1730 and acquitted him on the counts based on interstate calls to the other premises involved in the indictment. Petitioner therefore submits that no affirmative allegation by petitioner of an interest in the premises where OR 6-1730 was located was required to confer standing. *Cf. Jones* v. *United States,* 362 U.S. 257 (1960).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Dated: June 1969

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 322—September Term, 1967

(Argued February 8, 1968 Decided March 24, 1969)

(Final arguments by briefs filed September 23, 1968)

Docket No. 31293

UNITED STATES OF AMERICA, *Appellee,*

—v.—

JOSEPH COVELLO, *Appellant.*

Before: WATERMAN and FEINBERG, Circuit Judges, and BARTELS, District Judge.*

Appellant appeals judgment of conviction entered after guilty verdict at jury trial, United States District Court for the Southern District of New York, Mansfield, *J.* He seeks reversal of rulings below denying his motions to dismiss a nineteen count indictment upon which he was required to go to trial, or alternatively, a reversal and remand for a new trial because of a claimed erroneous denial of his motion to suppress certain evidence and certain claimed various prejudicial erroneous trial rulings. Conviction affirmed.

ROBERT G. MORVILLO, JOHN E. SPRIZZO, Asst. United States Attorneys, ROBERT M. MORGENTHAU, United States Attorney, *for Appellee.*

ROBERT L. WEINBERG, EDWARD BENNETT WILLIAMS, VINCENT J. FULLER, WILLIAMS & CONNOLLY, Washington, D. C., *for Appellant.*

* Of the Eastern District of New York, sitting by designation.

WATERMAN, *Circuit Judge:*

Joseph Covello having been found guilty after a jury trial in the United States District Court for the Southern District of New York appeals from the judgment of conviction entered upon the verdict. He was indicted on nineteen counts,[1] was found guilty on counts 1 through 6, on count 17 and on count 19, and was acquitted by the jurors on each of the remaining eleven counts. We affirm the judgment of conviction.

Count 1 charged appellant Covello and codefendants Thomas Molinaro, Armando Restaino and Anthony Nappi with a conspiracy in violation of 18 U. S. C. § 371[2] to violate federal interstate gambling statutes, 18 U. S. C. § 1084[3]

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[1] This indictment filed February 19, 1965 superseded a prior one from which it does not differ except for the addition of Anthony Nappi as a codefendant in count 1.

[2] § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[3] § 1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for

and 18 U. S. C. § 1952.[4]

Counts 2 through 6 charged appellant Covello with using interstate telephone facilities between New York and New

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use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

[4] § 1952, in pertinent part, reads as follows:

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(2) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

* * * * *

Jersey in violation of 18 U. S. C. § 1084. Counts 7 through 11 charged Covello and Molinaro, and counts 12 through 16 charged Covello and Restaino, with similar violations of § 1084.

Counts 17 through 19 charged appellant Covello and Molinaro with violation of 18 U. S. C. § 1952 for allegedly traveling in interstate commerce between New Jersey and New York to conduct a business enterprise involving gambling in violation of a New Jersey statute prohibiting bookmaking.

Covello was sentenced to concurrent sentences of three years imprisonment on count 1, two years imprisonment on each of counts 2 through 6, and three years imprisonment on each of counts 17 and 19.[5]

The Government's case in support of the allegations in counts 2 through 16 was based on the testimony of four witnesses and the New York Telephone Company records of toll calls from a New York City number, TR 9-3755, to three New Jersey numbers, OR 6-1730, HU 4-4190, and HU 4-9011. The New York number was listed to Howard Garfinkel at 944 Park Avenue, New York City, where Howard and his brother Merrill Garfinkel lived. The New Jersey numbers were listed to one John Marsh and to de-

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[5] Defendant Nappi was acquitted by the court at the close of the government case. The issues as to the guilt of the other defendants on all nineteen of the counts charged in the indictment were submitted to the jury for resolution. Molinaro was found to be guilty on counts 1, 7 through 11, 17 and 19. He, together with Covello, was acquitted on count 18. Restaino was found to be guilty on counts 1, and 12 through 16. Inasmuch as the court had submitted the cases of Molinaro and Restaino on counts 7 through 11 and 12 through 16 on the theory that these defendants had aided and abetted the criminal activity of Covello and the jury had acquitted Covello on all of these counts the court set aside these verdicts of guilty. Judgments of conviction against Molinaro on counts 1, 17 and 19 and against Restaino on count 1 have not been appealed. Both received six month prison terms.

fendant Molinaro and defendant Hestaino respectively. The toll call records the Government submitted in evidence also showed calls to Covello's home number, PL 9-2829, and to the number of the Chez Charles Night Club, HU 3-9405, where Covello was employed as the manager.

Merrill Garfinkel, the key government witness, testified that during the baseball season of 1961 and throughout the football, basketball, and baseball seasons of 1961 up to June 19, 1963, he furnished Covello, for an agreed biweekly compensation of $200, a "betting line" by telephoning the "line" to a number in New Jersey. In addition, Merrill testified he would wager with Covello for himself and others over the telephone by using the same number. The calls, he said, were usually placed from a New York City phone booth but were made occasionally from his home at 944 Park Avenue. Merrill did not recall the number which he called in New Jersey during the 1961 baseball season, but he did remember the numbers OR 6-1730, HU 4-4190, and HU 4-9011 as the ones by which he reached Covello during the 1962-1963 sporting seasons. He had no recollection of the specific contents of any of these calls.

Howard Garfinkel corroborated the testimony of his brother. He testified that he was sometimes present when Merrill called Covello and that he furnished Covello the "betting line" during periods when his brother was on vacation.

A third witness, Vincent Conour, testified that upon being furnished Covello's number at OR 6-1730 by Merrill Garfinkel, he thereafter telephoned wagers to that number. He also described a visit he made to Covello at 312 Park Avenue, East Orange, New Jersey, the address where OR 6-1730 was located.

A fourth witness, Herbert Seid, testified that he too was introduced to Covello over the telephone by Merrill Garfinkel and that he thereafter placed wagers with Covello

by telephone in 1962 and 1963. He could not remember, however, what numbers in New Jersey he had telephoned.

Counts 2 through 6 on which Covello was convicted involve only the OR 6-1730 number. The other two New Jersey numbers relate to counts 7 through 16 on which Covello was acquitted.

Count 17 was based on the testimony of witness Conour concerning an alleged meeting with Covello and Molinaro at Conour's apartment in New York on May 14, 1962 to settle a balance of $5,123 owed to Conour for his winnings.

Count 19 was based on an alleged settlement meeting in New York on June 13, 1963, at which Covello, Molinaro, Merrill and Howard Garfinkel and Herbert Seid were allegedly present.

The sufficiency of the Government's evidence at trial is not in issue. Appellant's appeal, however, alleges a number of evidentiary errors.

I.

§ 605 of the Federal Communications Act

At the trial the Garfinkels were unable to recall the specific times and date of their alleged phone calls to the defendant. Instead, the Government submitted in evidence the New York Telephone Company's records of toll calls, or "toll slips," made from Garfinkels' home number to the aforementioned New Jersey numbers. The slips showed the number from which the call was placed, the number and city to which the call was placed, the fact that the call was completed, the date and time of the call and the length of the conversation. Appellant's objection to the admissibility of the "toll slips" as evidence obtained in violation of § 605 of the Federal Communications Act of 1934, 47 U. S. C. § 605 (1964), as amended, Omnibus Crime Control and Safe Streets Act of 1968, P. L. 90-351 (June 19, 1968), was denied.

Section 605 then provided:

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utiliz-

ing the contents of any radio communication broadcast, or transmitted by amateurs or others for use of the general public, or relating to ships in distress.[6]

The statute addresses itself to two distinct classes of persons. See *Bubis* v. *United States*, 384 F. 2d 643, 646 (9 Cir. 1967); *United States* v. *Russo*, 250 F. Supp. 55 (E. D. Pa. 1966). In the first category are persons who have to do with the "receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio." The second category encompasses all other persons not within the first class. Arguably, the accounting employees of the New York Telephone Company who furnished the FBI the toll slips in the case at bar, having nothing to do with sending, receiving, or forwarding communications, are not within the ambit of persons proscribed by Clause 1 of § 605, see *Hanna* v. *United States*, 393 F. 2d 700, 705 (5 Cir. 1968) (rev'd on rehearing, 404 F. 2d 405) (5 Cir. 1968); *Bubis* v. *United States, supra* at 646, and we need go no further unless we find an interception as required by Clause 2. For purposes of this case, however, and this case only, we assume, as appellant apparently wishes us to hold, that treatment of the entire telephone company as one person is the sounder construction of the statute. See *Hanna* v. *United States*, 404 F. 2d 405 (5 Cir. 1968); *United States* v. *Russo, supra.*

Defendant argues that the divulgence of the toll slips was a prohibited disclosure by the corporate person of the existence of a communication within the meaning of § 605. We disagree. We cannot subscribe to such a literal application of the statutory language where the effect of such an interpretation is to transgress the obvious congressional

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[6] The recent amendment to 47 U.S.C. § 605 by the Omnibus Crime Control and Safe Streets Act of 1968 does not alter the substance of the original statute set forth in the text above.

intent. Section 605 "must be interpreted in the light of reason and common understanding to reach the results intended by the legislature." *Rathbun* v. *United States*, 355 U. S. 107, 109 (1957).

We agree with defendant that Section 605 was not intended to apply only to the substance of communications, *United States* v. *Dote*, 371 F. 2d 176, 180 (7 Cir. 1966), *affirming United States* v. *Guglielmo*, 245 F. Supp. 534 (N. D. Ill. 1965), and see *United States* v. *Caplan*, 255 F. Supp. 805, 808 (E. D. Mich. 1966), but we are not here involved with the manipulative use of a pen register,[7] as in *Dote* or *Caplan*, or with some other investigatory device.[8]

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[7] The pen register is a mechanical device attached on occasion to a given telephone line, usually at central telephone offices. A pulsation of the dial on a line to which the pen register is attached records on a paper tape dashes equal to the number dialed. The paper tape then becomes a permanent and complete record of outgoing calls as well as the numbers called on the particular line. Immediately after the number is dialed and before the line called has had an opportunity to answer (actually the pen register has no way of determining or recording whether or not the calls are answered) the pen register mechanically and automatically is disconnected. There is neither recording nor monitoring of the conversation. *United States* v. *Guglielmo*, 245 F. Supp. 534, 535 (N. D. Ill. 1965), aff'd, *sub nom. United States* v. *Dote*, 371 F. 2d 176, 180 (7 Cir. 1966).

In *Caplan* the use of a pen register by the telephone company was stimulated by the Internal Revenue Service in conjunction with an investigation that agency was conducting against defendants for suspected violation of gambling laws. *Caplan* is not a case involving only accounting information kept or commonly known to be kept by the telephone company in the ordinary course of the company's business.

[8] A few courts, in fact, have even sustained the admissibility of records obtained by the telephone company through use of pen registers, monitoring, and recording devices, etc., and have upheld subsequent divulgence thereof to a government agency when these devices were employed in connection with any investigations to detect thefts committed against the telephone company. *United*

Rather, the keeping of toll records is a necessary part of the ordinary course of the telephone company's business and is necessary in order that the company may substantiate its charges to its customers. Toll records are kept for all telephone subscribers and are not kept just for subscribers being investigated by officers of the law, or ones suspected of criminal proclivities. The subscriber is fully aware that such record will be made, *United States* v. *Gallo*, 123 F. 2d 229, 231 (2 Cir. 1941), and the records of the telephone company so kept in the ordinary course of the company's business are entitled to the same evidentiary treatment as the records of other businesses. See Federal Business Records Act, 28 U. S. C. § 1732 (1964). Section 605 was not designed to render evidentially inadmissible the records made in the ordinary course of the telephone company's business and which are essential to the ordinary operation of that business.

Our disposition of this issue obviates the need for us to consider whether the demand of an FBI agent to obtain the records constitutes "other lawful authority" under § 605, or, of a divulgence to a government investigator had been voluntarily made, whether the issuance of a subpena for the records so as to have them produced at a trial cure any original illegal divulgence, or whether a defendant charged with federal crime has standing to challenge the receipt into evidence against him at his trial of telephone company toll records showing that his number had been called.

States v. *Hanna*, 260 F. Supp. 430 (S. D. Fla. 1966), aff'd, 404 F. 2d 405 (5 Cir. 1968); *Brandon* v. *United States*, 382 F. 2d 607 (10 Cir. 1967); *United States* v. *Beckley*, 259 F. Supp. 567 (N. D. Ga. 1965). Cf. *Bubis* v. *United States*, 384 F. 2d 643 (9 Cir. 1967). Contra, *Huff* v. *Michigan Bell Tel. Co.*, 278 F. Supp. 76 (E. D. Mich. 1967).

II.

Best Evidence Rule

Most of the toll records introduced here were copies rather than originals. Appellant contends that the Government did not lay an adequate foundation for the use of such secondary evidence, and that the court below erred in holding to the contrary. The contention is without merit. The admisssibility of secondary evidence is within the broad discretion of the trial judge. *United States* v. *Ross*, 321 F. 2d 61, 70 (2 Cir.), *cert denied*, 375 U. S. 894 (1963); *Galbreath* v. *United States*, 257 Fed. 648, 658 (6 Cir. 1918); McCormick, Evidence, 414 (1954); 4 Wigmore, Evidence, 340 (3d ed. 1940). The judge here did not abuse his discretion in ruling that the testimony of a security officer of the telephone company that a diligent search of his office had not uncovered the originals was a sufficient foundation for the introduction of the identified copies.

III.

The Jencks Act

Appellant urges that the rights secured to him by the so-called Jencks Act, 18 U. S. C. § 3500 (1964), were violated on several grounds. First, he claims that following the direct testimony of an FBI agent at the pretrial hearing on appellant's motion to suppress evidence obtained through an alleged illegal eavesdrop, discussed *infra*, he was entitled to inspect the agent's reports relating to the agent's testimony, and this inspection was denied him. We approve the ruling below. The Act was enacted by Congress in order to qualify the loose interpretations the lower federal courts[9] had accorded the Supreme Court decision

[9] A collection of the lower federal court cases after *Jencks* v. *United States*, 353 U. S. 657 (1957) and prior to the enactment of 18 U. S. C. § 3500 can be found in the legislative history of that Act. H. R. Rep. No. 700, 85th Cong., 1st Sess. (1957); S. Rep. No. 981, 85th Cong., 1st Sess. (1957).

in *Jencks* v. *United States*, 353 U. S. 657 (1957), and to provide an exclusive[10] procedure for handling demands by a defendant for the production of statements, reports, and similar material that government witnesses had given to law enforcement agencies prior to the defendant's trial. S. Rep. No. 981, 85th Cong., 1st Sess. (1957), 1957 U. S. Code Admin. News 1861. The specific purposes of the bill were not to make such material available to the defense until "after the Government witness has testified against the defendant on direct examination in open court, and to prevent disclosure before such witness has testified." *Id.* at 1863. Suppression hearings are nowhere alluded to in the legislative history and the statute does not supply any direct guidance for conduct at such hearings.[11] In all

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[10] "The purpose of the Act, its fair reading and its overwhelming legislative history compel us to hold that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U. S. C. § 3500 cannot be produced at all." *Palermo* v. *United States*, 360 U. S. 343, 351 (1959).

See also *Rosenberg* v. *United States*, 360 U. S. 367, 369 (1959); *Canaday* v. *United States*, 354 F. 2d 849, 859 (8 Cir. 1966).

[11] 18 U. S. C. § 3500 (1964) in its entirety reads as follows:

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to

probability Congress did not consider the question whether a suppression hearing is itself a "trial" or whether such a

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the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcript thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

hearing is so much an integral part of the criminal trial that determines a defendant's innocence or guilt so as to intend either that the Act apply to such a hearing or that it not do so. In any event, the courts have consistently construed the statute literally, reading "trial" to mean "trial," and have held that under 18 U. S. C. § 3500 the pre-witness-stand statements of persons testifying at suppression hearings are not comprehended within the statements the defense is entitled to examine at suppression hearings. See *United States* v. *Giuliano,* 348 F. 2d 217 (2 Cir.), *cert denied,* 382 U. S. 946 (1965); *United States* v. *Wallace,* 272 F. Supp. 838 (SDNY 1967); *United States* v. *Cobb,* 271 F. Supp. 159, 164 (SDNY 1967); *United States* v. *Leighton,* 265 F. Supp. 27, 35 (SDNY), *affirmed,* 386 F. 2d 822 (2 Cir. 1967), *cert. denied,* 390 U. S. 1025 (1968); *United States* v. *Tane,* 29 F. R. D. 131, 133 (EDNY 1962); *United States* v. *Abrams,* 29 F. R. D. 178, 183 (SDNY 1961); *United States* v. *Rosenberg,* 157 F. Supp. 654, 661 (E. D. Pa.), *affirmed,* 257 F. 2d 760 (3 Cir. 1958), *affirmed,* 360 U. S. 367 (1959) . Our decision in *United States* v. *Foley,* 283 F. 2d 582 (2 Cir. 1960), relied, upon by appellant, is not to the contrary. In *Foley* the Government sought by mandamus to have us instruct the district judge to vacate his order providing for suppression hearing and providing for the production of documents at that hearing. We denied the petition but we read our denial as holding no more than that we left it to the discretion of the trial judge whether to order a production of documents; we do not read it to hold as a matter of law that the Jencks Act compelled disclosure to defense counsel of the pre-hearing statements of a witness who testifies at a suppression hearing.

Appellant next claims that the good faith destruction of handwritten interview notes deprived him of his rights at trial under the Jencks Act. At the close of the direct examination of each of the Government's main witnesses defendant requested and received FBI reports regarding

FBI interviews with each of the witnesses. Defendant claims, however, that under 18 U.S.C. § 3500 he was also entitled to the original handwritten interview notes of the FBI agents from which the reports were made. At a voir dire examination the agents testified that, pursuant to the practice they customarily follow, they destroyed their notes in good faith after incorporating them into typewritten reports. Under the circumstances, we find no violation of § 3500. The case law amply supports our ruling. Absent an indication that the notes were destroyed for an improper purpose or that the handwritten data was not preserved in the formal reports the reports satisfy the requirements of § 3500. *United States* v. *Williams,* 384 F. 2d 488, 493 (2 Cir.), *cert. denied,* 385 U.S. 836 (1966); *United States* v. *Jones,* 360 F. 2d 92, 95 (2 Cir.), *cert. denied,* 385 U.S. 1012 (1966); *United States* v. *Comulada,* 340 F. 2d 449, 451 (2 Cir.), *cert. denied,* 380 U.S. 978 (1965); *United States* v. *Aviles,* 337 F. 2d 552, 559 (2 Cir. 1964); *United States* v. *Greco,* 298 F. 2d 247, 250 (2 Cir.), *cert. denied,* 369 U.S. 820 (1962); *United States* v. *Thomas,* 282 F. 2d 191, 194 (2 Cir. 1960); *United States* v. *Baker,* 358 F. 2d 18 (7 Cir.), *cert. denied,* 385 U.S. 869 (1966); *Ogden* v. *United States,* 323 F. 2d 818 (9 Cir. 1963), *cert. denied,* 376 U.S. 973 (1964).[11a]

Appellant, however, argues that § 3500 does not contain any "good faith exception," citing *Lee* v. *United States,* 368 F. 2d 834, 837-838 (D. C. Cir. 1966) and *United States* v. *Lonardo,* 350 F. 2d 523, 529 (6 Cir. 1965). Both cases are distinguishable. In *Lee* the court's statement that "the Jencks Act does not embody in terms any 'good faith' exception," 368 F. 2d at 837, must be read in conjunction with the court's explicit statement distinguishing *Lee* from cases like the one here where the destroyed notes were "incor-

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[11a] See also *Alexander* v. *United States,* 336 F. 2d 910 (D. C. Cir.), cert. denied, 379 U. S. 935 (1964); *Augenblick* v. *United States,* 377 F. 2d 586 (Ct. Cl. 1967); *Killian* v. *United States,* 368 U. S. 231, 242 (1961).

porated into documents which were produced for the defense." *Id.* at 838, n. 7.[12] And in *Lonardo* the court's holding that the failure to produce interview notes was a violation of § 3500 was carefully restricted to apply when the notes are deliberately destroyed by an FBI agent on the eve of trial and substantial differences between the content of the notes and that of the formal interview report are evident.

Appellant also contends that he was entitled to the federal income tax returns of the Government's main witnesses as "statements" of the witnesses within the meaning of 18 U.S.C. § 3500(e)(1). While there is no decision on point, the argument is unpersuasive. The filing of the returns of the witnesses was unconnected with the investigation of Covello's activities or the criminal proceedings initiated against him, and the returns were filed with an entirely separate federal agency. Although it is the privilege of defense counsel in run-of-the-mill situations to decide whether examination of requested material would advantage the defense, here it seems clear that these income tax returns could not have been in any way helpful. Each witness admitted that he had not reported any income he received from gambling activities, and, as the witnesses had testified they had gambled, these confessions were the most Covello could have hoped to extract from them, for the only purpose the returns could have been used for was that of impeaching the credibility of the makers, see *Rosenberg* v. *United States,* 360 U.S. 367 (1959). Therefore, we do not rule upon the issue appellant would have us rule upon but state that under the circumstances here it would not appear to have been error to have withheld the returns; but, if error, the error did not prejudice the defense in any way.

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[12] The deliberate delay by the police between offense and arrest in *Lee* was another factor influencing the Fifth Circuit's decision. 368 F. 2d at 837.

Covello's final Jencks Act contention is that the court below erred in refusing to direct the Government to turn over to the defense numerous excerpts from FBI reports of statements made by the Garfinkels. After an *in camera* inspection the trial judge ruled that the requested materials bore no relation to the subject matter of the Garfinkels' direct testimony. These withheld materials were sealed for our review of the challenged ruling. The question of whether a statement or transaction falls within § 3500 is ordinarily a question of fact to be determined by the trial court, only reviewable by us within the limits of the clearly erroneous standard. *United States* v. *Sten*, 342 F. 2d 491, 493-494 (2 Cir.), *cert. denied*, 382 U.S. 854 (1965); *United States* v. *Birnbaum*, 337 F. 2d 490, 497 (2 Cir. 1964); *United States* v. *Cardillo*, 316 F. 2d 606, 616 (2 Cir.), *cert. denied*, 375 U.S. 822 (1963); *Hayes* v. *United States*, 329 F. 2d 209, 220 (8 Cir.), *cert. denied*, 377 U.S 980 (1964); cf. *Campbell* v. *United States*, 373 U.S. 487, 492-493 (1963); *Palermo* v. *United States*, 360 U.S. 343, 354 (1959).

We have examined the sealed statements and we hold that the trial court did not commit error. In essence the withheld materials related to the Garfinkels' knowledge of the gambling activities of persons other than the defendants. While the information contained in these materials may have been employed by defense counsel to show that the Garfinkels, whose "betting line" activities they had themselves testified to, were engaged in the business of bookmaking, it is clear that the information the trial judge withheld was not sufficiently relative to the subject matters the witnesses had testified about to fall within limits of demandable material Congress had carefully delineated in 18 U.S.C. § 3500; and if the defense demand had been complied with the judge would have exceeded the statutory proscription embodied within 18 U.S.C. § 3500(b). See note 11, *supra*.

IV.

Validity of the Indictment

The Government's four main witnesses, Merrill and Howard Garfinkel, Seid, and Conour, did not testify before the grand jury that returned the original indictment or the grand jury that returned the superseding indictment. Though these witnesses were available to be called the only evidence presented to either grand jury was hearsay testimony by FBI agents who related statements made to officers by Merrill Garfinkel and Conour. This was discovered by the defense at trial and appellant, attacking the validity of the indictment, moved in arrest of judgment. This motion was denied. We affirm. In *Costello* v. *United States,* 350 U.S. 359 (1956) the Supreme Court held that an indictment based exclusively on hearsay need not be dismissed. See also *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400 (1958). Though we have recently voiced our disapproval of indictments grounded totally on hearsay where the witnesses whose information was related to the grand jury by others were available to testify in person, we have never quashed an indictment for this reason. *United States* v. *Umans,* 368 F. 2d 725, 730 (2 Cir. 1966), *cert. dismissed as improvidently granted,* 389 U.S. 80 (1967); see *United States* v. *Beltram,* 388 F. 2d 449, 451 (2 Cir.), *cert. denied, sub nom. Colon* v. *United States,* 391 U.S. 955 (1968); *United States* v. *Andrews,* 381 F. 2d 377 (2 Cir. 1967), *cert. denied,* 390 U.S. 960 (1968); cf. *United States* v. *Payton,* 363 F. 2d 996, 998-999 (2 Cir.), *cert. denied,* 385 U.S. 993 (1966).

Appellant contends that, irrespective of the state of the authorities, the case before us is distinguishable from *Costello* and the cases following *Costello.* He claims that here the hearsay evidence presented to the grand jury did not sustain all elements of the offense for which appellant was indicted. In particular, he asserts no evidence was given to the grand jury concerning the specific telephone calls on

which each of counts 2 through 16 was predicated. We have examined the grand jury minutes and find defendant's charge entirely without substance. The grand jury heard specific testimony relative to each telephone toll call alleged in the Government's bill of particulars, as well as to many other calls also.

V.

Electronic Eavesdropping

Appellant next claims that his motion to suppress the fruits of an electronic eavesdropping upon calls to OR 6-1730, the phone number upon which counts 2 through 6 were predicated, was improperly denied below. The contention is premised on the disposition of the case of *United States* v. *Borgese*, 235 F. Supp. 286 (SDNY 1964), *conviction vacated*, 372 F. 2d 950 (2 Cir. 1967), in which the defendant Borgese claimed the Internal Revenue Service had illegally eavesdropped on his telephone calls to OR 6-1730 and in which after more than three years the judgment of conviction was vacated when the United States Attorney ascertained and advised this court that there had been governmental *unlawful wiretapping*. The claim that there was an unlawful *electronic surveillance*, therefore, was left unresolved in the *Borgese* case although such a claim was a main thrust of the arguments upon appeal.

The court below, after holding an evidentiary hearing at which four government agents testified, denied the motion to suppress, and found that no evidence in the case at bar was derived as a result of the eavesdropping in the *Borgese* case. The trial judge found that "the FBI developed this case independently and without knowledge or use of any evidence obtained by the Internal Revenue Service in the *Borgese* case . . . including the fact that Borgese used or called ORange 6-1730 or any other evidence," and therefore he saw no need to determine the validity of the eavesdropping, if any there were, involving activities and com-

munications of either Borgese or the present appellant, Covello.[13]

As far as we can tell, the Government has never admitted, and the defense has never shown, that there ever had been any electronic "bugging" of the appellant's conversations. Absent a revelation of monitoring activity, Covello's reliance on *Black* v. *United States,* 385 U.S. 26 (1966), vacating and remanding 353 F. 2d 885 (D.C. Cir. 1965), in which certiorari was initially denied, 384 U.S. 927, but granted upon rehearing, 384 U.S. 983 (1966), and *O'Brien* v. *United States,* 386 U.S. 345 (1967), which he offers to support his claim that he is entitled to a new trial is misplaced. In both of these cases the Supreme Court vacated judgments or conviction only after the Solicitor General *voluntarily* advised the Court that conversations in which the defendants participated were overheard and intercepted through use of concealed monitorial devices.

Appellant further requests that the Government state whether there has been any electronic eavesdropping or wiretapping upon him by any government agency. He also requests that, if necessary to obtain a compliance, the Government be judicially directed to divulge this information. The trial court ruled that whether action was to be taken upon this request was a matter for the Government, in its discretion, to decide, and not a subject for a court order. While it seemed to us unlikely that a defendant, on whom the burden of proof lies at a suppression hearing, might reasonably be able to uncover the existence of an electronic or wiretap surveillance other than by asking his

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[13] An individual has standing to suppress government evidence obtained through monitoring devices violative of the Fourth Amendment if the conversations overheard were those of the petitioner himself or conversations occurring on his premises, whether or not he was present or participated in these conversations. *Alderman* v. *United States,* 37 U. S. L. Week, 4189 at 4192 (March 10, 1969).

adversary to tell him of it,[14] for the purposes of this case we have not undertaken the task of evaluating the merits of the ruling below. Instead, we have endeavored to elicit, from the Department of Justice, a response to appellant's question. The Department courteously cooperated and the essential parts of our correspondence are set forth below.

On February 15, 1968 on behalf of the panel I wrote the following letter to Robert M. Morgenthau, United States Attorney for the Southern District of New York:

> "The panel of Judges Waterman, Feinberg and Bartels have discussed the above case, and, in view of the proceedings in U. S. v. Schipani and U. S. v. Borgese with which you are so familiar, and in view of statements recently made by the Attorney General of the United States, we three judges, through me as the panel scrivener, desire to know whether the United States has conducted a Schipani-type review to ascertain whether there may have been monitoring that might have affected the trial.
>
> "We think we should be informed of whether such a review has been conducted, is now in progress or is contemplated before we consider further the issues presented to us for resolution."

The subsequent correspondence of the parties with us we have treated as supplemental briefs *post-argument.*

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[14] In Title III, § 802, of the Omnibus Crime Control and Safe Streets Act of June 19, 1968, Pub. L. 90-351, 18 U. S. C. A. §§ 2510-2520, there are now provisions that would seem to assure that a defendant would know before his trial whether his conversations had been intercepted by government agents and in most cases what the intercepted conversations contained. In the usual case he would at the very latest be armed ten days before trial with this knowledge and would have an opportunity to suppress the evidence before trial. 18 U. S. C. § 2518(8)(d), (9), (10).

On February 27, 1968 Mr. Morgenthau replied as follows:

> "The Department of Justice, as it indicated to the Supreme Court in the case of *Schipani* v. *United States*, has undertaken an extensive review to identify any instances of unlawful electronic surveillance affecting a case which has been brought to trial.
>
> "Such a review has been conducted with respect to the above-captioned case of Joseph Covello. The Department of Justice has no information indicating that conversations of Joseph Covello were at any time overheard by unlawful electronic surveillance."

Thereafter, defense counsel, interpreting the above reply, suggested that the review undertaken by the Department of Justice was insufficient and that an adversary hearing in the district court to determine whether there had been electronic surveillance was still necessary. He advanced four grounds in support of his position, none of which appear to us to have merit for we fail to preceive how an additional hearing would further illumine the problem.

Appellant first objects to the United States Attorney's February 27 letter on the ground that the question of the "lawfulness" of any electronic eavesdropping is not properly a matter for ex parte determination by the Justice Department. This object is adequately disposed of by a subseqent communication from the United States Attorney's office. In this later correspondence, in reply to a letter of defense counsel inquiring whether the Schipani-type review the Department had conducted included an examination of the recordings and records of the monitoring that was done in the case of *United States* v. *DeCavalcante*, Criminal No. 111-68 (D.N.J. April 16, 1968), the Government flatly and unequivocally stated that "Mr. Joseph Covello . . . had not been a subject of direct microphone surveillance nor were any of his conversations

monitored by any electronic device."[15] In *DeCavalcante* the prosecution conceded that premises which the defense now asserts Covello frequented on numerous occasions had been under microphone surveillance. The recent Supreme Court pronouncement in *Alderman* v. *United States,* 47 U. S. L. Week 4189 (March 10, 1969) denying a defendant standing to suppress evidence derived from the electronic surveillance of other persons, including the defendant's codefendants and coconspirators, eliminates a second claim that Covello is entitled to have the Government disclose that very information. See note 13, *supra.*

As for the last two grounds urged to demonstrate that the Schipani-type review has been insufficient, we agree with appellant that, despite all the correspondence that has transpired in this case while it has been *sub judice,* there remains the possibility that a federal agency other than the FBI, such as the IRS, or state or local authorities, may have engaged in eavesdropping activities affecting Covello's privacy, and that such possibilities have not been foreclosed. But we feel assured that if any monitoring of defendant has taken place by any agency other

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[15] This statement was contained in a letter of July 17, 1968 from the Chief of the Department of Justice, Organized Crime and Racketeering Section, to U. S. Attorney Morgenthau and delivered by him to the panel with his enclosing letter of July 31, 1968. A fuller excerpt from the letter follows:

> "We have previously advised you that we had made inquiry as to Mr. Joseph Covello and that a review of the records revealed that he had not been a subject of direct microphone surveillance nor were any of his conversations monitored by any electronic device. Based upon the information contained in the enclosed letter of Williams & Connolly we inquired further of the Federal Bureau of Investigation referring them specifically to the installations referred to in the enclosed letter. We have just been notified that these locations had been taken into consideration in the previous review in this matter and Covello could not be identified as being present at or a participant in any conversations monitored by electronic devices at these locations."

than the U. S. Department of Justice, the monitoring *was not known* to the prosecution when Covello stood trial and that no information was obtained from any electronic surveillance of anyone's activities that was of value to the Government in connection with the case against Covello to taint the evidence the Government introduced at his trial.

Covello additionally submits that he should be granted another adversary hearing on his motion to suppress in order to cross-examine the FBI agents who monitored the electronic surveillance involved in the *DeCavalcante* case, discussed *supra*, and thereby to verify the assertions made by the FBI to the United States Attorney's office. See note 15 *supra*. Furthermore, for purposes of such hearing, relying upon *Baker* v. *United States*, 401 F. 2d 958 (D. C. Cir. 1968), appellant contends "that the logs kept by the agents who conducted the monitoring (and the recordings made if they are still in existence), insofar as these contain voices not identified by the agents, should be produced for inspection by appellant and his counsel to see if they can identify the conversation as one in which the appellant participated or which relates to the subject matter of the indictment." [16]

Appellant argues that inasmuch as the prosecution in the *DeCavalcante* case has admitted the installation of microphonic devices at two specific New Jersey locations his case should be remanded to the district court for a hearing on the eavesdropping issue. He points out that he lives in New Jersey and that on numerous occasions during the time of the electronic surveillance directed at DeCavalcante he was present at the "bugged" premises. The Government assures us that the Schipani-type review conducted at our request included a review of the eavesdropping directed against DeCavalcante, and we refuse to

[16] From September 19, 1968 letter of Attorneys Williams & Connolly to the panel in response to the letter of the United States Attorney of July 31, 1968. See note 15, *supra*.

subscribe to the need for a hearing; otherwise we would enable any defendant each time an eavesdropping of a location is disclosed subsequent to his trial to assert he was present at that location sometime during the "bugging" and thereby be entitled to a suppression hearing.

Nor are we persuaded that the holding in *Baker* v. *United States, supra,* aids the appellant in his quest for a hearing. Prior to the hearing in *Baker* the Government had made available to the defense all logs of conversations in which appellant Baker had been identified by the monitors as a participant or as having been present but did not make available any logs of conversations involving only unidentified persons. The Court of Appeals for the D. C. Circuit reversed this aspect of the district court ruling which had been in favor of the Government and remanded for another adversary hearing before which appellant Baker could inspect the logs of conversations of these unidentified persons. The Court stated:

> Inasmuch as the Government admitted both that it had overheard appellant's conversations through the Levinson and Sigelbaum devices and that it had intercepted other conversations involving unidentified persons, and in view of appellant's testimony that he had engaged in numerous conversations that might have been overheard through those devices, the possibility of appellant's having standing as to one or more of the undisclosed conversations was neither remote nor insubstantial. Certainly appellant was the person best qualified to ascertain whether any of the unidentified conversations was his, and the court's *in camera* examination of the logs, however, diligent and careful, was hardly an adequate substitute, in these circumstances, for an adversary proceeding. 401 F. 2d at 984.

Our case is quite dissimilar. Baker's voice was concededly identifiable when the recordings were played back, and so the Court of Appeals held that the defense was entitled to

hear all recordings of all voices made at the premises. Here no recording of Covello's voice was used or to be used against him. Covello seeks to detect whether a mystery voice recorded by devices employed to record the conversations of others than he could have been his voice. We find this broad difference in the two situations to be of controlling significance.

Nor does the recent Supreme Court ruling in *Alderman* v. *United States, supra,* extending the right of defendants to see transcripts of illegally monitored conversations have any bearing upon a judicial determination relative to whether one may also have the right to a suppression hearing. The rules set forth in *Alderman* do not become operative unless there is an admission by the Government that a pertinent electronic eavesdropping had occurred.

Finally, appellant contends that his character was improperly placed in issue and that the Government did not confine its proof to the bill of particulars. We find these contentions unpersuasive.

Accordingly the judgment of conviction is affirmed.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of March one thousand nine hundred and sixty-nine.

Present:

HON. STERRY R. WATERMAN,
HON. WILFRED FEINBERG,
Circuit Judges,

HON. JOHN R. BARTELS,
District Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

JOSEPH COVELLO, a/k/a Demes, *Defendant-Appellant*,

THOMAS MOLINARO, a/k/a JELLY BEAN, ET AL.,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Order Inviting Response to Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of April, one thousand nine hundred and sixty-nine.

Present:

HON. STERRY R. WATERMAN,
Circuit Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOSEPH COVELLO, a/k/a Demes, *Defendant-Appellant,*

THOMAS MOLINARO, a/k/a JELLY BEAN, ET AL.,
Defendants.

It is hereby ordered that the appellee may file an answer to the appellant's petition for rehearing on or before Monday, May 5, 1969.

A. DANIEL FUSARO
Clerk

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

31293

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOSEPH COVELLO, a/k/a DEMES, *Defendant-Appellant,*

THOMAS MOLINARO, a/k/a JELLY BEAN, ET AL., *Defendants.*

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

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Sterry R. Waterman

.....
Wilfred Feinberg U.S.C.JJ.

.....
John R. Bartels, U. S. D.J.

May 15, 1969